

Suicide Squad, Atrocity Crimes and the International Criminal Court

Written by W. Alejandro Sanchez

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<https://www.e-ir.info/2016/10/19/suicide-squad-atrocity-crimes-and-the-international-criminal-court/>

W. ALEJANDRO SANCHEZ, OCT 19 2016

DC Comics has published a one-issue story of its popular comic book franchise, *Suicide Squad*. *Suicide Squad: War Crimes* has the fictional team of “worst superheroes ever” undertake a mission in which they will have to deal with a very real organization: the International Criminal Court (ICC).

A Brief Plot

Given that the ICC has a prominent role in *War Crimes*, it is necessary to briefly summarize the comic's plot as this will help our analysis when we discuss what the ICC can and cannot do. In *War Crimes*, a European mercenary team, Strikeforce Europa, abducts the fictional George Carmody, a former U.S. Secretary of Defense (SecDef), in New York City. The goal is to take him to the ICC's headquarters in The Hague so he can be tried for 'alleged war crimes during the last Gulf action.' It is revealed that the team decided to kidnap Carmody on their own, without receiving orders from a government or the ICC. The ruthless Amanda Waller deploys Task Force X (popularly known to readers as the Suicide Squad) to The Netherlands to rescue Carmody while he is transported from the ICC's detention centre to its main facilities, both located in Scheveningen.

The objective is to prevent Carmody from having to stand trial since, as Waller puts it, 'he's guilty as sin.' She then briefly explains to the task force how Carmody headed a security company called Black Mountain Ltd, before becoming SecDef and 'some say he never stopped working for them. Carmody threw them a lot of work during the Gulf action. Big-time war profiteers.'

The Workings of the ICC

Typically comic book storylines create fictional characters and agencies, though there are cases when they mention real-world entities. *War Crimes*, correctly states that the ICC's detention center and main facilities are located in Scheveningen; however there are a couple of facts that deserve clarification.

The main plot problem with *War Crimes* is that the ICC must first open a case against an individual in order to subsequently order his/her arrest. Hence, even if the fictional Carmody was guilty of whatever crimes he allegedly committed, the ICC cannot arrest him and put him on trial if he happened to appear at its offices (e.g. after being kidnapped by the fictional Strikeforce Europa mercenaries).

The ICC's charter is quite clear on the reasons via which it can prosecute individuals. There are three possible routes:

1. 'A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed;' (ICC Treaty, Art. 14)
2. The United Nations Security Council can request that the ICC investigates an incident;
3. Or 'the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.' (ICC Treaty, Art. 15)

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According to the comic book, the Strikeforce Europa mercenaries were acting out of their own accord, without orders from a government or the ICC, when they took Carmody. This would not be acceptable for the Court, particularly if there was no case against him to begin with.

Additionally, even if theoretically the case against the fictional Carmody in *War Crimes* was not dismissed outright by the ICC, given that he was kidnapped from the U.S. without an order for his arrest, the U.S. could veto any judicial procedure against him.

The United Nations Security Council (UNSC), of which the U.S. is a permanent member, has the power to veto cases that could be brought to the ICC. According to Article 16 of the Rome Statute, 'no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect.' This power has been recently utilized. For example, in 2014 Moscow and Beijing, also UNSC permanent members, vetoed a resolution for the ICC to open a case for war crimes in Syria. Hence, the fictional Amanda Waller need not have worried about sending her team of criminals to The Hague to rescue the former U.S. SecDef, as Washington could have vetoed a judicial procedure against him.

Finally, there is the issue of nomenclature. The crimes prosecuted by the ICC are known as 'atrocity crimes;' this agency is not a 'war crimes tribunal' or 'genocide court.' The term 'atrocity' encompasses genocide, crimes against humanity, and war crimes (namely the crimes the ICC investigates). Hence, the *Suicide Squad* issue should have been called 'Suicide Squad: Atrocity Crimes.' (For further info, see the *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, published by the United Nations).

Setting Precedents

War Crimes does bring up an interesting scenario: the possibility of a government official from a developed nation being brought to stand trial at the ICC. While there is significant international support among governments and civic society for the court (after all, the Rome Statute was adopted in 1998 and the 60 ratifications needed to enter it into force were reached by 2002, and today it has 124 State Parties), there has been criticism that the ICC has focused on investigating atrocity crimes perpetrated by citizens of the developing world, particularly Africa, without investigating crimes committed by, for example, military personnel from a global power in another country. For example, Chad's president, Idriss Déby, has declared that 'elsewhere in the world, many things happen, many flagrant violations of human rights, but nobody cares.'

Currently there are nine cases that the ICC's Office of the Prosecutor is investigating, which are all located in the developing world: the Central African Republic (two cases), the Democratic Republic of Congo, Georgia, Ivory Coast, Kenya, Libya, Mali, Sudan (Darfur), and Uganda. Even more, the ICC has two arrest warrants (issued in 2009 and 2010) for Sudanese President Omar Hassan Ahmad Al Bashir, which have not been implemented, as the Sudanese leader has travelled abroad, including to South Africa in 2015, and has not been arrested. (The South African Supreme Court of Appeal reprimanded the government for not arresting the Sudanese head of state, hence it is unlikely that he will be able to enter the country again).

In an e-mail interview with the author, Kip Hale, an international atrocity law expert and former UN prosecuting attorney, argues that 'all cases at the ICC but Sudan and Libya were either expressly requested by the country in question, or in the case of Kenya, given every chance to handle the atrocities domestically (and in that case, the ICC was given little choice but to intervene in the face of impunity).' In other words, the aforementioned cases have followed the ICC's bureaucratic procedure as established by the Rome Statute, which over a hundred nations to date (including many Africa governments) have ratified and must adhere to. (There is also the issue of whether certain heads of state are attempting to undermine and delegitimize the ICC in order to prevent the Court from opening a case against them at some point).

Without a doubt, the ICC should not engage in the circus-type trial of the citizen of a global power or developed nation for the sole sake of appeasing governments from the developing world that would like to see more variety in

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the suspects that the court investigates. Moreover, the fact that most cases that the Office of the Prosecutor (OTP) is currently investigating originate in Africa is influenced by the number of conflicts taking place in said continent as well as the inadequate local judicial systems that cannot necessarily assure a competent and impartial judicial process, particularly when the defendant is, or was, a government official. As an analysis in the *International Policy Digest* explains, 'by limiting the role of the ICC to complementary [justice], the Rome Statute and the states that are party to the treaty created a last resort institution that will only be utilized if the country is unable or unwilling to prosecute their war criminals.' In other words, the ICC is supposed to be a 'last resort' option for justice, if domestic judicial systems are either inadequate or unwilling to process war criminals. The ongoing ICC case in Kenya is an example of this situation.

Even more, the ICC is starting to be active in areas outside of continental Africa. As Mr. Hale explains, 'the ICC is currently conducting preliminary investigations in Afghanistan (in part looking at US alleged abuses), Iraq (in part looking at UK alleged abuses) and Palestine (in part looking at Israel's alleged crimes),' apart from the ongoing case in Georgia vis-à-vis, alleged crimes committed by Russia during the 2008 conflict. Hence, the ICC is actually starting to investigate alleged crimes by the global powers.

Other regions of the world plagued by internal conflict have created their own courts as well as truth and reconciliation commissions to expose crimes and, if needed, prosecute individuals accused of atrocity crimes. For example, the Guatemalan government is currently prosecuting a former soldier, Santos López Alonzo, accused of ordering the death of over 200 individuals in 1982 during that Central American country's civil war. The judicial systems in these countries are far from perfect, but justice is (slowly) being served.

An Evolving Mandate?

It is important to note that in mid-September, the ICC decided to start investigating environmental crimes in addition to the four categories of crimes already under its jurisdiction (crimes against humanity, genocide, war crimes and crimes of aggression). A *Reuters* report explains that 'company executives or politicians could now be held responsible under international law for illegal land deals which violently displace residents following the shift.' Even more, the recent case of *The Prosecutor vs. Ahmad Al Faqi Al Mahdi* is another landmark as 'this is the first international trial focusing on the destruction of historical and religious monuments, and the first ICC case where the defendant made an admission of guilt.' On 27 September, Mr. Al Faqi was sentenced to nine years in prison.

This issue deserves an important clarification. As Mr. Hale explains, 'the ICC can only charge individuals for the three core atrocity crimes (until the crimes of aggression one day becomes available to it): war crimes, crimes against humanity, and genocide.' Hence, when the ICC charges individuals for environmental crimes or crimes against cultural property, 'these are not crimes separate from war crimes, crimes against humanity, etc. They are crimes being charged AS war crimes, crimes against humanity, and/or genocide. Specifically as it relates to war crimes, destruction of the environment and cultural property are already widely recognized war crimes and listed in the Rome Statute,' Mr. Hale explains.

The question then becomes if the ICC could try the citizen of a developed nation for environmental or cultural crimes if these fall under the provision of the ICC. Discussing such a scenario is beyond the scope of this analysis, but it is clear that if a government from the developed world agrees to have one of its citizens prosecuted by the ICC, this would set a monumental precedent and would give the Court further credibility as a global judicial body.

The U.S. and the ICC

Given that *War Crimes* focuses on the fictional scenario of a former U.S. official being tried at the ICC, it is important to note that the U.S. government has yet to ratify the Rome Statute. Some U.S.-based research centers argue that Washington should not do so. For example, the Heritage Foundation, published an issue brief in 2014 that advises the U.S. government to 'reaffirm its intent not to ratify the Rome Statute; reject ICC claims of jurisdiction over U.S. persons; [and] maintain and expand America's bilateral Article 98 agreements and exercise available options to protect U.S. persons from the ICC.'

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Even though the U.S has not ratified the Rome Statute, Washington has been heavily involved in helping prosecute atrocity crimes for decades. The desire to promote international justice is found in Washington's support for the United Nations War Crimes Commission (UNWCC); the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East after World War II; and the international criminal tribunals for the Former Yugoslavia and Rwanda in the 1990s. Washington was also involved in the establishment of the ICC itself.

Nowadays, while some official U.S. documents praise the Court, it is unclear if there is a significant official interest in joining it. For example, the 2010 National Security Strategy explains that 'although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.' Meanwhile, the 2015 National Security Strategy has a briefer mention of the ICC, simply stating that the U.S. 'will work with the international community to prevent and call to account those responsible for the worst human rights abuses, including through support to the International Criminal Court, consistent with U.S. law and our commitment to protecting our personnel.'

While the Obama administration recently made headlines by agreeing to ratify the Paris climate change agreement, we will probably have to wait until the next administration to see if the U.S. becomes a state party of the Rome Statute.

Final Thoughts

While *Suicide Squad: War Crimes* has a number of factual flaws regarding how the ICC, and the OTP in particular, operates, it nevertheless serves as an interesting point of departure to have a debate about the fairness the ICC so far in investigating atrocity crimes since it was established in 2002. The fact that a fictional U.S. SecDef is taken to The Hague to stand trial brings up the issue of which crimes and which countries the ICC has investigated so far, and which it has not, for one reason or other. While *War Crimes* is a fictional story, prosecuting atrocity crimes in the real world remains a complex, and sometimes infuriatingly slow, process.

**The views presented in this essay are the sole responsibility of the author and do not necessarily reflect those of any institutions with which the author is associated. The author would like to thank Kip Hale, Christian Maisch and Lucia Scripcari for their helpful suggestions.*

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